

BEFORE THE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
DEPARTMENT OF INDUSTRIAL RELATIONS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

DOUBLE H CONSTRUCTION
P. O. Box 351
Rio Vista, CA 94571

Employer

Docket Nos. 96-R1D1-900
and 902

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, hereby denies the petition for reconsideration filed in the above-entitled proceeding by Double H Construction (Employer).

JURISDICTION

Between September 29 and October 2, 1995, a representative of the Division of Occupational Safety and Health (Division) conducted a high hazard inspection at a place of employment maintained by Employer at 2401 Fillmore Street, San Francisco, California. On October 6, 1995, the Division issued to Employer Citation No. 2, alleging a serious violation of section¹ 1644(a)(7) [inadequate working platform on metal scaffold] and Citation No. 4, alleging a serious violation of section 1637(k)(2) [improperly erected scaffold]. The Division proposed civil penalties totaling \$50.

Employer filed a late appeal from the citations contesting the existence of the violations, and the Appeals Board granted the late appeal based upon good cause provided by Employer. After a hearing, an administrative law judge of the Board (ALJ) issued a decision dated December 4, 1996, denying Employer's appeal but reducing the classification of Citation No. 2 to general

¹ Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

and reducing the related civil penalty for Citation No. 2 to \$10 and increasing the related civil penalty for Citation No. 4 to \$250.

On January 9, 1997, Employer filed a petition for reconsideration. The Division filed an answer to Employer's petition on February 13, 1997.

EVIDENCE

In making its decision, the Board has thoroughly reviewed the administrative record in this matter. The Board has taken no new evidence.

ISSUE

Does the Appeals Board have jurisdiction to consider a petition for reconsideration that was not filed until after the statutory deadline?

REASONS FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code Section 6614 sets forth the deadline for filing a petition for reconsideration from the decision of an administrative law judge of the Board:

“At any time within 30 days after the service of any final order or decision made and filed by the appeals board or a hearing officer, any [aggrieved] party . . . may petition the appeals board for reconsideration. . . . Such petition shall be made only within the time and in the manner specified in this chapter.”

A regulation of the Board provides that “[t]he petition for reconsideration shall be filed at the Appeals Board in Sacramento, California, and shall be deemed filed on the date it is delivered or mailed to the Appeals Board.” (8 Cal. Code Regs. § 390.)

In the present case, the decision of the ALJ was served by mail on the parties on December 4, 1996. Because the decision was served by mail, the time for filing a petition was extended by 5 days. (See 8 Cal. Code Regs. § 348(c).) Thus, the last day to file a petition for reconsideration challenging the ALJ's decision was January 8, 1997, 35 days after service of the decision.

On January 9, 1997, Employer served its petition for reconsideration on the Board by mail. The petition was thus filed one day after the statutory deadline. For the reasons set forth below, the Board concludes that it does not have jurisdiction to consider the late petition.

In Unocal Corporation, OSHAB 92-639, Denial of Petition for Reconsideration (May 13, 1993), the Board was also presented with an untimely petition for reconsideration. There, the employer's petition was filed with the Board 40 days after the statutory deadline. In rejecting the petition, the Board held that:

"The requirement that a petition for reconsideration be mailed or delivered to the Appeals Board within 30 days of the issuance of the decision to be reconsidered is jurisdictional and the Appeals Board is without power to enlarge the time for the filing of a petition for reconsideration." (*Id.* at p. 3, quoting Dalton Construction Co., OSHAB 83-987, Denial of Petition for Reconsideration (Feb. 7, 1985) (emphasis in original).)

Also, in both Beutler Heating & Air Conditioning, Inc., OSHAB 93-2220, Denial of Petition for Reconsideration (Mar. 16, 1995), and Edwin D. Chapman, OSHAB 81-331, Denial of Petition for Reconsideration (Oct. 1, 1981) the Division missed the statutory filing deadline by one day and the Board held that missing the deadline, even by one day, was fatal to the Division's petition.

Accordingly, the Board finds that Employer did not file its petition within the statutorily-prescribed time. Therefore, the Board is without jurisdiction to review the ALJ's decision.

DECISION

The petition for reconsideration is denied. The decision of the ALJ is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
JAMES P. GAZDECKI, Chairman
BILL DUPLISSEA, Member
BRYAN E. CARVER, Member

SIGNED AND DATED ON FEBRUARY 25, 1997 AT SACRAMENTO, CALIFORNIA